STATE OF MICHIGAN

COURT OF APPEALS

JOHN CHRYCZYK,

Plaintiff-Appellee,

v

DAVID JUHAS and DUSAN JUHAS,

Defendants-Appellants.

UNPUBLISHED
January 27, 2011

No. 294348
Macomb Circuit Court
LC No. 2008-004080-NO

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In this tort action, defendants appeal by leave granted[1] from the trial court's order denying their motion for summary disposition. Plaintiff and defendant David Juhas[2] were teammates on the Anchor Bay High School tennis team. Plaintiff brought this action after he was seriously injured when he was struck in the eye with a tennis ball hit by defendant during a team practice. We reverse and remand for entry of an order of summary disposition in favor of defendants.

Plaintiff and defendant were separately practicing on opposite sides of adjacent courts. At his deposition, defendant testified that he was hitting back and forth with another teammate when a stray ball rolled onto his court. According to defendant, he picked the ball up, tossed it in the air, and hit it with a backhand to clear it from the court. Defendant stated that he was trying to hit the ball high and between the courts to the far fence when it accidentally struck plaintiff. Defendant further stated that when he saw the ball headed toward plaintiff, he shouted "heads up" to warn plaintiff.

At his deposition, plaintiff testified that he was in the midst of a doubles scrimmage when he was struck by the errant ball. According to plaintiff, defendant told him immediately after the

[1] *Chryczyk v Juhas*, unpublished order of the Court of Appeals, entered October 30, 2009 (Docket No. 294348).

[2] Defendant Dusan Juhas is David Juhas's father. Plaintiff's complaint alleges that Dusan Juhas is vicariously liable for the actions of his then minor son. References in this opinion to "defendant" in the singular are to David Juhas alone.

accident that "I was hitting a dead ball."[3] Plaintiff believed that defendant was frustrated by the "dead" ball so he took it and hit it as hard as he could.

Plaintiff's original complaint suggested that defendant "negligently and accidentally" struck plaintiff with a tennis ball causing plaintiff to suffer serious and disabling injuries. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). They argued that participants in recreational sports assume the risk of injury inherent to those activities, and that plaintiff was required to prove that defendant's conduct was reckless. The motion asserted that plaintiff had failed to proffer sufficient evidence of recklessness and could not proffer such evidence. With his response to defendants' motion for summary disposition, plaintiff submitted a first amended complaint alleging that defendant had acted recklessly. At the motion hearing, plaintiff's counsel argued that defendant acted recklessly when, according to plaintiff, he hit the ball forward in frustration instead of sweeping it to the fence behind him.

The trial court denied the motion for summary disposition, finding that a jury could conclude that defendant's actions rose to the level of reckless misconduct. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[4]

In *Ritchie-Gamester v Berkley*, 461 Mich 73; 597 NW2d 517 (1999), our Supreme Court addressed the appropriate standard of care for those involved in recreational activities. The Court concluded "that coparticipants in recreational activities owe each other a duty not to act recklessly." *Id*. at 75. The Court reasoned that "[w]hen people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint." *Id*. at 87. The Court further explained:

> When a player steps on the field, she must recognize that an injury may occur, but she does not know whether she will be injured, or whether she will inadvertently injure another player. We do not believe that a player expects an injury, even if it

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[3] Plaintiff defined a "dead" ball as one that had "been bounced too many times and it doesn't bounce as well as a normal ball would bounce."

[4] Although defendants' motion for summary disposition was brought pursuant to MCR 2.116(C)(8) and (10), only the (C)(10) standard applies in this case. Defendants' (C)(8) motion was based on the fact that plaintiff's complaint failed to address the proper standard of care, i.e., recklessness. However, plaintiff proffered an amended complaint addressing that issue. Defendants' remaining arguments relied on facts outside the pleadings. Thus, MCR 2.116(C)(10) was the appropriate rule under which the trial court decided the motion.

> results from a rule violation, to give rise to liability. Instead, we think it more likely that players participate with the expectation that no liability will arise unless a participant's actions exceed the normal bounds of conduct associated with the activity. [*Id*. at 94.]

In the context of an injury incurred during a soccer game, this Court relied on the following definition of reckless misconduct:

> "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." [*Behar v Fox*, 249 Mich App 314, 319; 642 NW2d 426 (2001), quoting *Gibbard v Cursan*, 225 Mich 311, 321; 196 NW 398 (1923),[5] quoting *Atchison, T & SF R Co v Baker*, 79 Kan 183, 189-190; 98 P 804 (1908).]

When viewed in a light most favorable to plaintiff, the evidence indicated that defendant acted out of frustration when he cleared a tennis ball from his court by hitting it as hard as he could between two adjacent courts to the far fence. However, defendant's aim was off and the ball struck plaintiff. These facts do not place defendant in the same class as the willful doer of wrong.

No matter how frustrated he might have been, or how hard he hit the ball, defendant was simply trying to clear the ball from his court by hitting it between his court and plaintiff's court. There is no evidence that he was indifferent to whether the ball might strike someone. To the contrary, the undisputed evidence indicates that defendant was aiming between the courts, away from his teammates, and when he realized that the ball might strike plaintiff on the adjacent court, he called out to warn him.

The trial court reasoned that summary disposition was inappropriate because a jury could conclude that defendant struck the ball in a way that was out of the ordinary at practice. However, the deposition testimony indicated it was common practice for the students to hit errant balls forward to get them out of the way. To the extent that there was a rule that players should lightly sweep such balls to the fence line behind them, the evidence indicated that the rule was regularly violated such that defendant's actions did not exceed the normal bounds of conduct associated with tennis practice at Anchor Bay.

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[5] *Gibbard* was overruled on other grounds by *Jennings v Southwood*, 446 Mich 125, 521 NW2d 230 (1994).

Getting hit by an errant ball was a risk inherent to tennis practice at Anchor Bay High School. Defendant may have been negligent in hitting the ball as he did, but the facts do not indicate that he acted with a willingness to injure someone as plaintiff argues. Accordingly, defendant's actions do not rise to the level of reckless misconduct. There was no genuine issue as to any material fact, and the trial court should have granted summary disposition in favor of defendants.

Reversed and remanded for entry of an order of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering